No. 546.
Reply Brief of Herbert, McCook
for Appellant
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Supreme Court of the United States

OCTOBER TERM, 1899.

GEORGE DEWEY, *Appellant*,
v.
THE UNITED STATES.

No. 546.
Appeal from the Court of Claims.

BRIEF FOR APPELLANT IN REPLY.

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For Appellant.

WILLIAM B. KING,
For other Officers and Men.

IN THE

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Authority Cited For Defense.

The learned Assistant Attorney-General in the brief for the United States cites the case of *The Siren*, 13 Wall. 389, as authority for the view that the grant in this case is to be construed with great strictness, and that a construction carrying out the spirit of the statute can not be approved, unless there is no room for doubt as to its literal inclusion in the grant.

Distinction Between the Cases.

We would first point out, however, a very important distinction between this case and that of *The Siren*, or others of like import.

There no grant had taken effect. The question was: Should a vessel captured by a conjoint expedition be considered prize for distribution to the naval captors? The rule there applied was that the word "prize" in the statutes of the United States must be read in the sense understood in the English law, capture by maritime force alone. There was no question of a reward for special gallantry. The rule as to strict construction was stated by the court in the course of the argument.

Here the question presented is different. It is not in issue whether there is a grant of bounty. Vessels of war belonging to the enemy were in this case destroyed by vessels of war belonging to the United States. That fulfilled every condition necessary to establish the grant. That the present statute grants bounty in the engagement at Manila Bay is not, and has never been, in question. The sole question in the case is one of measuring the amount of bounty that shall be bestowed.

The distinct object of increasing the grant is to reward special gallantry in defeating a superior force, a generous purpose to be generously construed. Under these conditions the reasons given in *The Siren* and other cases for the strict construction of the grant must yield to the more prevailing reason which induced the doubling of the grant already made. If generally the overcoming of a superior force is to be considered the subject of a double reward, then that reward must be construed so as to effect this object. It is conceivable that the correct rule might require a strict construction in determining whether a public grant has actually been made, but when that grant, as in this case, is once clearly established, the courts may certainly recognize a liberal construction in determining the amount of the grant, where the increase is given for a particular and meritorious purpose.

It must be said also that the assertion of the rule of strict construction in that case was pure *obiter dictum;* it was quite unnecessary to the decision of the case.

Instances of Liberal Construction.

In spite of the rule laid down in *The Siren* case and the principle sometimes asserted that public grants are to be construed with great strictness, we find many cases which point out exceptions. It is submitted that this

grant is of an exceptional nature and should be ruled with liberality to carry out its object.

Endlich on the Interpretation of Statutes, § 109, after discussing remedial acts, states a recognized principle:

"Upon a similar principle, it would seem, it has been declared, that, where the object of a statute is to confer bounty, ambiguities in its provisions are to be construed liberally in favor of the intended beneficiaries."

Black, Interpretation of Laws, 320, announces the same rule:

"Where the object of an act of Congress or of a State legislature is to confer a bounty or reward, in consideration of meritorious services rendered to the State, or in aid of a deserving charity or for the compensation of public officers it should not be subjected to a restrictive interpretation. On the contrary, such a statute ought to be liberally construed, in furtherance of its beneficent purposes and policy, and any doubts or ambiguities arising upon its terms should be resolved in favor of its intended beneficiaries."

The cases cited fully sustain these views.

In *Ross* v. *Doe*, 1 Pet. 655, the court had before it the question of a donation of land, a grant from the public domain, and used in regard to it the following language (p. 667):

"The language of the second section of the act of Congress, authorizing these donation claims, is, that the persons who, on that day of the year 1797, when the Mississippi territory was finally evacuated by the Spanish troops, etc.

"This language is very peculiar, and shows plainly that, although Congress, at the time of passing the law, was certain of the fact of evacuation by the Spanish troops, that body was not informed of the precise time when the evacuation took place.

"The law was intended to confer a bounty on a numer-

ous class of individuals; and, in construing the ambiguous words of the section, it is the duty of the court to adopt that construction which will best effect the liberal intentions of the legislature.

"To interpret this section literally, that land should be granted to those who, on the same day of the year 1797, occupied a tract of land, provided the Spanish troops finally evacuated the territory, and on that very day of that very year 1797, would totally defeat the operation of the law, and the bounty intended by it, if it should have happened that the final evacuation of the territory, by the Spanish troops, took place on the first day of January, 1798, or on any subsequent day.

"If an individual had inhabited and cultivated a tract of land every day in the year 1797, still, according to the letter of this section, he was not entitled to the bounty of the government, because the Spanish troops had not evacuated the territory any day of that year, but some day of the next year; and, although the party continued to occupy the land until the day of the actual evacuation, still, he could not be entitled, according to the letter of the act, because that day was not any day of the year 1797.

"This could not be be the intention of Congress. The country had been settled during the conflict on the subject of boundaries, between Spain and the United States, by the citizens and subjects of both governments. It was a weak and exposed frontier of the United States. The manifest general intent of the act of Congress is to confer a bounty upon the inhabitants and cultivators of the soil, who elected to remain in the country at the time of the actual evacuation by the Spanish troops. In this view of the subject, the time of the actual evacuation was very important, but whether it was on some day in the year 1797 or 1798, was comparatively unimportant."

This was a case where a demand could readily have been made for a strict and literal construction, as it was a bounty from the public domain granted upon conditions expressed in the grant. A liberal rule was applied, not at all beyond the rule demanded in this case,—the pur-

pose being, as we insist should here be done, to effect the liberal intention of the legislature.

In *Walton* v. *Cotton*, 19 How. 355, the word "children" in a pension act was held to include grandchildren, and the court said (p. 358):

"The pension is undoubtedly a bounty of the government."

But in construing the application of the word "children" a liberal construction was adopted, the court saying as follows (p. 358):

"Congress, from high motives of policy, by granting pensions, alleviate, as far as they may, a class of men who suffered in the military service by the hardships they endured and the dangers they encountered. But to withold any arrearage of this bounty from his grandchildren, who had the misfortune to be left orphans, and give it to his living children, on his decease, would not seem to be a fit discrimination of national gratitude.

"Under the construction given by the department, if a male pensioner die, leaving no widow or children, but grandchildren, the pension can not be drawn from the Treasury. This would seem to stop short of carrying out the humane motive of Congress. They have not named grandchildren in the acts; but they are included in the equity of the statutes. And the argument that the pension is a gratuity, and was intended to be personal, will apply as well to grandchildren as to children.

"There can be no doubt that Congress had a right to distribute this bounty at their pleasure, and to declare it should not be liable to the debts of the beneficiaries. But they will be presumed to have acted under the ordinary influences which lead to an equitable and not a capricious result. And where the language used may be so construed as to carry out a benign policy, within the reasonable intent of Congress, it should be done."

In *Silver* v. *Ladd*, cited in our opening brief (p. 31), a grant to "single men, married men, and their wives"

was held to extend to widows in order to effect the purpose of the act, although this was one from the public domain.

In *United States* v. *Union Pacific R. R. Co.* 91 U. S. 72, the requirement was that this company should "pay said bonds at maturity," and the contention was that this implied the payment of the interest as it should accrue. The court considered the circumstances under which the law was passed (p. 88), and giving the act a liberal construction to enhance its object, decided that the purpose of the grant was to exact payment from the company of interest, only when the principal became due. Here was a case of a grant from the public treasury, and a liberal rule of construction was adopted.

To like effect is the recent case of *The Buena Ventura*, 175 U. S. 384, cited in our opening brief (p. 30). The claim for the release of the vessel was in derogation of the rights of the United States, and was based on a grant contained in the President's proclamation which gave away the public right to an alien enemy. This court held that the grant should be liberally construed so as to carry out its purpose and, in spite of its being a grant of a public right, a very broad construction was adopted.

In *Morse* v. *United States*, 3 Story, 87, 27 Fed. Cases, 1, the rule was laid down by Justice Story that where the words are loose and obscure, in a statute fixing the compensation of a public officer, the construction ought to be favorable to the claims of the officer. This was followed in *McKinstry* v. *United States*, 40 Fed. Rep. 818; *United States* v. *Collier*, 3 Blatchf. 333, 25 Fed. Cases, 527; *Moore* v. *United States*, 4 C. Cls. 141; *Butler* v. *United States*, 23 C. Cls. 165.

In the case of *The Matilda*, 1 Dod. 367, an American privateer captured by the British privateer *Lion* was retaken, near the close of her voyage, by the American

sloop *Argus*, and again, later on, recaptured by the British frigate *Revolutionaire*. She was condemned as prize to the *Revolutionaire*, and the question was, whether she had not so lost her military character by capture and recapture, as to extinguish the right to head money to the *Lion*.

"The court expressed its inclination to go as far as possible in support of the claim for head money under such circumstances, and accordingly decreed head money for 15 men due to the *Revolutionaire*, and for 80 men to the *Lion*, the prize having actually been brought home, notwithstanding intermediate hostile re-possession."

The question is not unlike that of salvage. In *The Beckford*, 3 C. Robinson, 356, Sir William Scott said:

"The principles on which this Court of Admiralty proceeds lead to a liberal remuneration in salvage cases, for they look not merely to the exact quantum of service performed in the case itself, but to the general interests of navigation and the commerce of the country.

"What enhances the pretensions of salvors most is the actual danger which they have incurred; the value of human life is that which is, and ought to be, principally considered in the preservation of other men's property, and if this is shown to have been hazarded it is most highly estimated."

Thus we see that, like all other statutory rules of strict and liberal construction, the rule that public grants are to be rigidly interpreted, is subject to the broad qualification that such grant must receive a reasonable construction and not be so construed as to defeat the intention of the legislature.

This case is a claim for bounty where the particular sum in dispute was given plainly as a reward for gallantry in overcoming a superior force. It is not just that a strict rule of construction should be adopted whereby the general intent of Congress should be sacrificed for the

sake of a construction whose only merit is a rigid adherence to a narrow meaning ascribed to the words of the statute.

A very sound rule of construction is that announced by Mr. Chief Justice Nott of the Court of Claims, in *Upton* v. *United States*, 19 C. Cls. 49:

"In this country, where statute law is the hurried work of over-busy individuals, very little importance can be attached to accidents of phraseology. Every year of judicial experience renders plainer the fact that judges to interpret aright must put themselves in the position of the legislators who made the statute, and gather from its general purposes the meaning of its obscurer parts."

Limited Effect of Siren Case.

It may indeed be said that the authority relied upon by the learned Justice Swayne in the *Siren* case for the rule of strict interpretation hardly sustains his dictum. In *The Elsebe*, 5 Rob. 155, the question was as to the power of the Crown to release property before adjudication, the captors objecting. The court says (p. 181):

"No man can have any interest but what he takes as the mere gift of the Crown."

And on p. 183:

"The crown which declares hostilities can limit their operations; it can except individuals; it grants particular passes, it exempts particular classes of the enemies' ships."

While all this is admitted law, it can have no bearing on this case nor can it sustain the rule so broadly announced in the case of *The Siren*, at least so far as it may be sought to apply it here. We contend that the question presented by this case, namely, the meaning to be given to "force" of a vessel, where there is no question but that the right

to bounty exists, and the question presented by the case of *The Siren*, whether under the conditions of the capture, the vessel taken was, within the meaning of the word, a prize at all, are so different that laying down the rule of strict construction in that case, has no application whatever to the question presented here.

The case of *The Siren*, instead of establishing the rule here contended for by the defense, that shore batteries actually present and participating, are not to be counted, establishes just the reverse. The land forces were counted in that case, and it was because they had to be counted that the navy could have no prize. The court said:

"The two forces were acting under the order of a common government, for a common object, and for none other. They were united in their labors and their perils, and in their triumph they were not divided. They were converging streams toiling against the same dike. When it gave way both swept in without any further obstruction. The consummation of their work was the fall of the city. Either force, after the abandonment of their defenses by the rebels, could have seized all that was taken by both."

Could the rule here sought to be established have been invoked in the case of *The Siren*, and the shore forces actually present been excluded from all consideration, no question could have arisen as to the capture being a maritime one, and the right of the navy to share in it.

The only grant of prize is to the navy for captures by the navy. Here the capture was not by the navy; it was by a conjoint expedition. Thus the condition of the grant, capture by the navy, never occurred. But in the present case, where the reason is just the reverse, and there is no question as to any one except the beneficiaries under the act having destroyed these vessels and being entitled to share, you can hardly invoke a rule of strict construction based, as in *The Siren*

case, upon the English definition of prize, which was never meant to be a reward at all for conduct in action.

Neither here nor in England, was there ever a case holding that anything but substantial assistance from the army deprived the navy of the right to prize, and in *The Rebekah*, 1 Rob. 229, the prize was adjudicated to the captors as a naval capture, although some of the naval force used guns from a naval station on shore. There has never been a case where there was present a force actually contributing to the capture of a prize or the destruction of a vessel, or aiding and protecting a prize from capture or vessel from destruction and that force was not considered, even if its consideration as in the case of *The Siren* debarred prize altogether.

For What Purposes are Shore Defenses Counted?

The brief of the Attorney-General states:

"What good reason is there, after reading the forts and land batteries into the force of the enemy's vessels, for leaving them out when it comes to a distribution of prize money? Once having got them into the engagement as part of the naval force of the enemy, why should they not remain to be distributed as prize, or increase the amount of the bounty?"

The statute fixes definitely the basis of computing bounty. It is to be the number of persons aboard the vessel of war destroyed at the commencement of the engagement. In view of this we claimed, for the purpose of computing bounty, neither the men ashore nor those on the vessels captured; yet the court below held the captured vessels to be a part of the force of the enemy's vessels destroyed. When it comes to the comparison of forces, Congress has used a term broad enough to include every fighting force available to aid and protect the ships

throughout the engagement. Claim of the men ashore manning the guns as part of the force is inferred from claiming the guns. The guns would be useless without the men to man them, as much so as without projectiles; yet it is their active participation in the engagement that is made the basis for our claiming them as a part of the force possessed by the vessels for offense and defense.

Our learned adversary does not seem to recall that the English law of prize extended to captures on land by naval forces, and although this was repealed in this country by the act of July 17, 1862, 12 Stat. L. 606 (*Mrs. Alexander's Cotton*, 2 Wall. 421, 422), yet it is a disputed question now under judicial consideration whether the English rule was not re-enacted here by the act of June 30, 1864, § 33, 13 Stat. L. 315.

Bounty, How Calculated.

There are two factors determining the amount of bounty. The entire relative force, men, guns, vessels and fortifications, determines the ratio, $100 or $200. This is the multiplier. The other factor, the multiplicand, is the number of men on the vessels destroyed. The two factors are made up on entirely different bases.

The application of this subject is treated on page 20 of appellant's brief.

CONCLUSION.

It is admitted in the brief for the appellees (p. 3) that the force of the convoying men of war is the force of the prize.

"Nor is there any strained conclusion in construing the force of an unarmed prize to include the force of her convoy. The prize and the convoy combined constitute one naval force of which each vessel is a part. Hence the force of each is the force of every other vessel of the fleet."

This can only be because the prize is possessed of this force at the time of the capture. Where are the words in the statute that draw the line between such a force and the force of shore batteries likewise co-operating at the time of the capture? Is not one as much within the statute as the other?

The Attorney-General we think has thus been forced to concede the logic of our position.

The intent of the act, entirely consistent with the words used, requires the construction claimed, the nature of the victory demands it, judicial decision has never heretofore refused it. The judgment of the court below should be reversed.

We most respectfully ask for an early decision.

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WILLIAM B. KING,
For various Officers and Men.

ADDENDUM.

We call attention especially to this statement:

No English decisions and no American decisions can throw any light upon the precise point here at issue, namely, the measurement of the quantum of bounty.

This is so in England, because no law in England ever made any difference in the amount of bounty; and in America the question was never raised in this court.

The Court of Claims has therefore, by finding that the claimant is entitled to bounty, conducted us to the point where precedents can no longer throw light upon the question being considered, excepting, of course, the actual administrative decisions which are in our favor.

The question therefore before this court, as to the quantum of bounty, is to be decided entirely upon the provisions of the statute, according to its spirit, intent, and the analogies we have cited. There seems to be absolutely no case in which a statute giving so beneficent a reward as one for gallantry in maintaining the rights of one's country in battle, has ever received anything less than the most liberal construction.

We respectfully ask an early decision of this case, that Congress may appropriate for officers and men according to such decision as the court shall render.